

BEFORE THE

ORIGINAL

Federal Communications Commission

WASHINGTON, D.C. 20554

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In the Matter of)
)
Amendment of the Commission's Regulatory)
Policies Governing Domestic Fixed Satellites)
And Separate International Satellite Systems)

IB Docket No. 95-41

To: The Commission

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REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION

Columbia Communications Corporation ("Columbia"), by counsel and pursuant to Section 1.429(g) of the Commission's rules (47 C.F.R. § 1.429(g) (1995)), replies to the oppositions filed to its petition for reconsideration of the Commission's Report & Order in the above-captioned proceeding.^{1/} Columbia sought reconsideration of one aspect of the Commission's Report & Order -- the decision to adopt a one-size-fits-all financial standard applicable to all satellite applications at the outset of the application process. Columbia showed that such a standard would have an arbitrary adverse impact on smaller satellite applicants -- particularly those seeking orbital locations outside the congested domestic arc that must depend on provision of transoceanic and other

^{1/} Amendment of the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, FCC 96-14, slip op. (released January 22, 1996) ("Report & Order").

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international services -- without offering any clear benefits in promoting the prompt initiation of service.

Predictably, Columbia's request for a more reasoned and tailored standard has been vigorously opposed by GE American Communications, Inc. ("GE Americom") and Hughes Communications Galaxy, Inc. ("Hughes"), subsidiaries of giant Fortune 10 corporations which, as the controlling oligopolists in the U.S. domestic satellite market, would be the primary beneficiaries of a rigid single-stage financial qualification standard. Both companies have a clear interest in promoting the ill-effect of the Commission's one-stage financial showing — dramatically limiting future entry of U.S. companies and stifling expansion opportunities for the other existing U.S.-licensed satellite systems.

DISCUSSION

I. The Commission Should Modify Its Financial Standard To Permit Applicants To Make Two-Stage Showings Without Seeking A Waiver Of The Standard.

In its Petition, Columbia observed that the two-stage financial standard has been very successful, resulting in the launch of three new competitive operators in the international satellite marketplace while, conversely, the stringent one-step standard has not been consistently successful in producing domestic U.S. applicants that have actually implemented service.^{2/} Hughes chooses to attack this demonstration simply by citing a

^{2/} See Columbia Petition at 12-13, citing, e.g., AT&T et al., 2 FCC Rcd 4431, 4435 (1987).

few instances where separate systems applicants that received conditional authorizations have not constructed systems.^{3/} In doing so, it misses the central point that neither the single-stage financial showing nor the two-stage process has consistently identified applicants that will proceed to construct systems quickly — i.e., each standard has produced both successes and failures. Accordingly, there is no clear nexus between the use of the one-stage showing and the Commission's goal of preventing "warehousing" of the orbit/spectrum resource, and there was no basis for the Commission to abandon the two-stage financial standard in favor of a significantly more rigid standard that would effectively limit future satellite operation to well-heeled corporate giants.

Hughes and GE Americom offer no justification for the Commission to continue on the path set in the Report & Order, only empty, unsubstantiated assertions that "any other result would significantly impair the global competitiveness of U.S. licensees"^{4/} and that "alternative means of preventing warehousing of orbital slots are clearly inadequate."^{5/} Each of these assertions is patently incorrect. As to the first contention, it is the Commission's current course toward squeezing out smaller

^{3/} See Hughes Opposition at 5. Hughes wrongly implies that Columbia claimed no conditionally authorized "separate system" satellite had ever failed to commence operations. In fact, Columbia simply pointed out that the Commission's Report & Order included no references to problems with the two-stage showing that it was abandoning. Compare Columbia Petition at 12 & n.18.

^{4/} Hughes Comments at 7.

^{5/} GE Americom Comments at 4.

companies that would impair U.S. competitiveness by drastically limiting the potential field of U.S. satellite operators — undermining the Commission’s “primary obligation ... to ensure that the U.S. public has available to it the widest range of satellite service offerings from the greatest number of competitors possible.”^{6/} The abandonment of conditional authorizations may prevent even existing operators, with significant customer bases, from taking steps to continue their service. On the other hand, foreign administrations can be expected to continue to claim orbit/spectrum resources on behalf of all types of putative service providers.^{7/}

Moreover, it is simply not the case that the application of a rigid threshold financial standard is the best means of discouraging warehousing.^{8/} As Hughes itself notes,^{9/} the Commission’s International Bureau recently declared null and void an authorization that had been granted to Norris Satellite Communications, Inc. (“Norris”) (pursuant to a complete waiver of the domestic financial standard) because Norris had

^{6/} Report & Order, FCC 96-14, slip op. at 14 (¶ 40).

^{7/} See also Orion Petition at 7-8.

^{8/} Notably, “warehousing” is essentially the stockpiling of the orbit/spectrum resource for possible future use, e.g., following greater development of a service market. Existing operators, with current capacity to market, have no particular incentive to warehouse orbital slots, as their primary focus is on selling or leasing their existing transponders. When this focus changes to the construction of new spacecraft, it is typically because existing capacity is saturated, or there is a need for a follow-on satellite.

^{9/} See Hughes Opposition at n.11.

failed to meet its initial construction milestone.^{10/} These resources were immediately reclaimed to be made available to other applicants that are more likely to implement service expeditiously. This example illustrates the fact that strictly applied system milestones on unconditional authorizations can be an effective means of preventing warehousing and promoting the prompt initiation of service.^{11/} In the case of Norris, while its proposal did not come to fruition, neither did it produce any delay in service by others.^{12/}

Alternatives to a rigid financial standard are necessary because the one-stage requirement would leave small companies unreasonably disadvantaged in the quest for system funding. Large companies that represent reliance on internal funds can nonetheless use unconditional authorizations in support of bids to secure external funding (which they typically do), while small companies would be left without even the benefit of a conditional authorization in approaching the same funding sources — sources that

^{10/} See Norris Satellite Communications, Inc., DA 96-363, slip op. (released March 14, 1996).

^{11/} GE Americom imprudently suggests that the only effect of milestones is to limit the length of time that a slot is warehoused, but not the actual warehousing of the slot. See GE Americom Comments at 4. However, under the one-stage process, which is effectively a grant-stamp for companies with substantial current assets, the Commission cedes control of the slot to the licensee for whatever length of time it chooses to take in constructing its system, without any limit at all. See also Orion Petition at 8.

^{12/} Existing satellite operators such as Columbia, Orion and PanAmSat, of course, stand a much better chance of success than newcomers such as Norris.

are now accustomed to dealing with satellite operators that have some color of government authority in hand. For applicants seeking to serve international routes, such a handicap is compounded by the additional uncertainties posed by the INTELSAT consultation process, international coordination, and the issue of access to various foreign markets.^{13/} Contrary to Hughes' characterization, each of these elements was a factor in the initial adoption of the two-stage financial standard,^{14/} and each remains relevant today.^{15/}

^{13/} Applicants gearing their service to the vast U.S. domestic market do not need access to other markets to be viable, whereas a system premised on transocean and international service must necessarily gain access to a significant number of foreign markets, in addition to the U.S., in order to survive.

^{14/} “[W]e believe that issuance of some kind of preliminary authorization is necessary for an applicant to obtain foreign authorization of its proposed system — a condition precedent for U.S. initiation of the Article XIV(d) consultation process. In addition, the applicant will have difficulty in locating customers for its proposed capacity and/or services absent both a construction permit and successful completion of the Article XIV(d) consultation process.” Establishment of Satellite Systems Providing International Communications, 101 F.C.C.2d 1046, 1165 (1985).

^{15/} Hughes' reference to the adoption of a one-step financial standard for the Big LEO mobile-satellite service (“MSS”) (see Hughes Opposition at 3 n.6) is simply inapposite to the question posed here relative to the fixed-satellite service (“FSS”). While global MSS systems may indeed face more uncertainties than FSS applicants, the entire scope and character of the global MSS service is distinct from route-based FSS service. Columbia, among others, has proven that start-up companies can become FSS operators, where initial costs can amount to tens of millions of dollars. With respect to the Big LEO MSS service, however — where start-up costs run in the billions — it is not clear whether any entity reasonably characterized as a “small business” can hope to compete.

Hughes is particularly wrong in suggesting that the uncertainties posed by consultation under Article XIV(d) of the INTELSAT Agreement “no longer exist.”^{16/} Both Columbia and the FCC have recent experience with negotiations involving INTELSAT (for the extension of the consultation for Columbia’s use of TDRS-4 at 41° W.L.) during which INTELSAT demonstrated that it continues to use the Article XIV(d) process in an effort to insulate itself from competition.^{17/} Given this recent example, the difficulties posed by Article XIV(d) cannot be discounted as an impediment to international satellite operators until this aspect of the INTELSAT Agreement is abandoned entirely (presumably in connection with a general restructuring of INTELSAT).

II. Alternatively, The Commission Should Clarify Its Waiver Standard.

In the event that the Commission does not modify the financial standard itself, Columbia proposed in its Petition that the standard for waiver of the single stage showing should at least be clarified to permit applicants to offer an overall explanation of the current unavailability of capital, based on its experience in the industry, rather than

^{16/} See Hughes Opposition at 3.

^{17/} See Columbia Communications Corp., DA 96-703, slip op. at 8 (¶ 16) (Int’l Bur. released May 6, 1996) (noting INTELSAT’s “failure” to “hold itself to a higher standard than its pure commercial interests in coordination negotiations”).

offering specific examples of rejected financing initiatives.^{18/} Such an approach would require an applicant to make an affirmative showing that market realities support a waiver without compelling it to damage its credibility by seeking financing prematurely.^{19/}

Hughes' contention that such a clarification would "eviscerate the financial qualification standard altogether" is absurd.^{20/} The true reason for Hughes' objection is likely the fact that a reasonable waiver standard — one which allows companies requiring external financing to obtain conditional licenses under appropriate circumstances — would render the one-step standard ineffective as a barrier to entry.

Certainly, it is a desire to erect such barriers to entry that prompts Hughes' most egregious suggestion — that pending applications that are not mutually-exclusive with other current applicants should nonetheless be compelled to satisfy the one-stage financial showing immediately.^{21/} Incredibly, Hughes implies that the pending non-mutually-exclusive applications of Columbia, Orion and PanAmSat might reasonably be dismissed absent satisfaction of the full financial showing because "other U.S. licensees

^{18/} See Columbia Petition at 19-20.

^{19/} In addition, other circumstances (e.g., the absence of mutually exclusive applications) would also need to be present for a waiver to be granted.

^{20/} Hughes Opposition at 10.

^{21/} See Hughes Opposition at n.18. GE Americom does not join in this strained argument. See GE Americom Opposition at 3, 4 & n.3 (acknowledging the Commission's willingness to accord "more lenient treatment of applicants in circumstances where there is less danger of warehousing because orbital slots are in lower demand.")

may be prepared” to make use of the orbital slots requested.^{22/} The Commission must not deny to U.S. satellite operators the opportunity to maintain and expand their existing services based on the flimsy notion that some other unnamed entity might be prepared to put the same resources to use at some indefinite time.^{23/} Hughes’ suggestion is starkly revelatory of the anticompetitive purpose of its Opposition to the Petitions for Reconsideration filed by Columbia, Orion and PanAmSat.

CONCLUSION

The Commission should reject the attempts by Hughes and GE Americom to expand their dominance of the U.S. satellite market to encompass both the domestic and international sectors. The Commission should permit all U.S. satellite applicants to utilize the two-stage financial showing originally adopted for separate systems, and

^{22/} Hughes Opposition at n.18 (emphasis added)

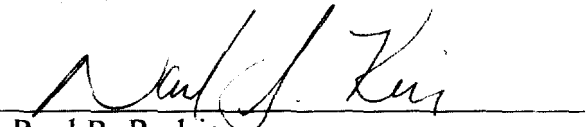
^{23/} Such an approach would also be contrary to the Commission’s recent actions in its 28 GHz proceeding, where financial qualification requirements were waived for all applicants based on the absence of mutual exclusivity within the processing round. See Assignment of Orbital Locations to Space Stations in the Ka-Band, DA 96-708, slip op. at 2 (¶ 5) (released May 6, 1996).

require demonstrations of committed internal or external funding only when there are mutually exclusive applicants for authorizations in the same service.

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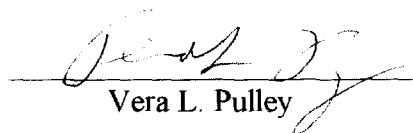
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